

U.S. Department of Labor

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Issue date: 19Apr2001

CASE NO.: 2000-LHC-01086

OWCP NO.: 07-136641

In the Matter of:

STEPHEN ALLEMENT,
Claimant

v.

BATON ROUGE MARINE CONTRACTORS,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.,
Carrier

APPEARANCES:

Terrence J. Lestelle
For Claimant

Maurice E. Bostick
For Employer/Carrier

BEFORE: JAMES W. KERR, JR.
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act"). The claim is brought by Stephen Allement, Claimant, against his former employer, Baton Rouge Marine Contractors, Inc., and Respondent and Signal Mutual Indemnity Association, Carrier. A hearing was held in Metairie,

Louisiana on August 8, 2000, at which time the parties were represented by counsel and

given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

- 1) Court's Exhibit No. 1;
- 2) Claimant's Exhibits Nos. 1-7; and
- 3) Respondent's Exhibits Nos. 1-22.¹

Upon conclusion of the hearing, the record remained open for additional exhibits and the submission of post hearing briefs, which were received by both parties. This decision is being rendered after having given full consideration to the entire record.

STIPULATIONS²

After an evaluation of the record, this Court finds sufficient evidence to support the following stipulations:

- (1) The fact of the injury/accident is disputed;
- (2) Claimant alleges that he injured his back in March, 1993, while working for Respondent. Respondent disputes this allegation;
- (3) An employer/employee relationship existed during the time of the alleged injury;
- (4) The alleged injury arose in the course and within the scope of employment;
- (5) The date Respondent was notified of the injury was March 13, 1995;
- (6) Notice of Controversion was filed on June 21, 1995 and January 13, 2000;
- (7) An informal conference was held on January 5, 2000;
- (8) Disability resulted from the alleged injury;
- (9) Medical and disability benefits have been paid, pursuant to section 7;
- (10) Disability compensation was paid to Claimant in the following amounts:

Temporary Total	8/29/93 to 10/29/95	\$760.92 per week
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¹ The following abbreviations will be used in citations to the record: CTX - Court's Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

²CTX-1

Temporary Partial	10/30/95 to 10/13/96	\$310.03 per week
Permanent Partial	2/3/97 to present	\$295.93 per week

- (11) All workers' compensation benefits owed through September 30, 1999 have been paid;
- (12) Maximum medical improvement is disputed;
- (13) Claimant's average weekly wage is \$1,245.05.

ISSUES

The unresolved issues in this proceeding are:

- (1) Fact of Injury and Causation;
- (2) Nature and Extent of Disability;
 Suitable Alternative Employment and Sheltered Employment;
 Date of Maximum Medical Improvement;
- (3) Reasonable and Necessary Medical Benefits;
- (4) Claimant's Section 48(a) claim.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Stephen Allement

Stephen Allement, Claimant, testified that he is forty-five years old and has a wife and two children. He stated that he was a high school graduate and received a degree in auto mechanics from a vocational-technical school. Claimant stated that prior to his employment with Respondent, he was consistently employed in auto mechanic work. He stated that he was employed at one or two shop foreman and service manager jobs prior to working for Respondent. Claimant added that at Respondent's facility, he was strictly employed in the automotive end of the business. TR. 34-38.

Claimant testified that he began working for Respondent as a mechanic in March, 1993. He stated that he was injured while trying to unload some cargo from a broken carriage. He stated that when he attempted to grab the cargo, it dropped, and he felt a popping in his back. He added that his back hurt at that point. Claimant stated that he continued to work, but reported the incident to his supervisor on the next work day. He stated that soon after the incident, he drove a truck to Mississippi for Respondent in order to load a ship. He stated that his back pain worsened when he was loading the cargo in Mississippi, but he continued to work. Claimant testified that he returned to Baton Rouge and was hired as a longshoreman on that same ship to load cargo. He stated that during loading, the pain in his back worsened to the point that he could not walk. He stated that he was told to go home and immediately see a doctor

by the wharf superintendent, Greg Johnson. Claimant added that he stopped work on May 28, 1995 and had back surgery, performed by Dr. Bailey, two weeks later in June. TR. 38-41.

Claimant testified that before he underwent surgery, Carrier requested that he see Dr. Applebaum. He stated that he did have the surgery and returned to work with Respondent as a maintenance supervisor. He added that this was not the position he held prior to his surgery. Claimant testified that he was told by Ralph Hill, Greg Johnson, and Mike Titone that a position would be created for him which would require him to run the mechanic shop. He added that he was told he was no longer required to do mechanic work, and could go home whenever he was in too much pain. Claimant testified that, to his knowledge, there had never been a maintenance supervisor at the mechanic shop where he was employed. He stated that the shop foreman, Henry Falcon, was "put back down" as a mechanic, and he was appointed Mr. Falcon's supervisor. He stated that he was not required to do anything that would hurt him. He could sit, stand, or leave work at his discretion. He admitted that he sometimes stood and sat for more than thirty minutes at a time. Claimant stated that he always informed someone that he was leaving. Claimant testified that he left work approximately one to two days per week, depending on how much he exerted himself. He stated that he was occasionally required to drive a truck from dock to dock and normally had to take one to two days off afterwards. TR. 41-47, 85.

Claimant testified that he was employed as maintenance supervisor from October, 1995 to September 30, 1999. He stated that he was paid a salary plus compensation, because the position did not pay as much as his prior mechanic position. He stated that he was the only individual that had an ongoing longshore claim who was terminated in September, 1999. Claimant added that he was terminated by Greg Johnson, who told him that his position was originally created for him and that his termination was due to cut backs in the company. He was also told by Mr. Johnson that he would be placed on full compensation, which did not happen. Claimant stated that he continues to be compensated on the partial rate, established as \$591.00 every two weeks. He added that he believed he was terminated because he was injured. TR. 47-53, 85.

Claimant stated that after he was terminated, he sought employment on his own initiative. He added that he applied for approximately eighty-four positions, including all of the jobs given to him by Carla Seyler, since his termination. Claimant stated that he did want to work and maintained a positive approach at each of the interviews that he attended. He stated that he has only been able to secure two jobs since his termination from Respondent's facility. The first was as a shop foreman at Scott Construction Equipment. He was told this position did not involve heavy lifting. However, he admitted that he did climb on heavy equipment in order to get hour meter readings and serial numbers. Claimant stated that he obtained this job through his cousin and worked with Scott Construction from December, 1999 to May, 2000. He testified that he alternated sitting and standing. He testified that he left this position because specific supervisors within the company were unwilling to be flexible in light of his disability and his physical therapy appointments. The store manager, who was not aware of Claimant's disability at the time of hiring, instructed Claimant to engage in lifting items within the store and to work more overtime. Claimant added that the service manager knew about his disability and was accommodating, however, he had been out of

town for an extended period of time. Claimant testified that the job was not created specifically for him, but tailored to fit his disability. Claimant stated that his employment records reflect that he missed three days of work, but that he took approximately thirty hours off of additional time, that were not reflected in the employment records. He added that some of his physical therapy appointments had to be cancelled, and he was not allowed to reschedule them by Carrier. Claimant testified that he received competent

ratings in both his quantity and quality of work, as well as a wage increase while employed with Scott Construction. TR. 53-59, 87-88, 92-98, 120-125.

Claimant testified that soon after this incident, he was told there was no longer a need for a shop foreman, and he was laid off by Scott Construction. However, when he returned to the shop to retrieve his equipment, someone was parked in the shop foreman's spot. Claimant stated that he saw the owner of the car doing shop foreman work. He added that he did not know if that particular individual was doing shop foreman work in addition to his own duties. TR. 59-62.

Claimant testified that he immediately began seeking employment with other construction companies. He stated that he was able to secure a minimum wage position as a part-time driver with Baton Rouge Auto Auction. He began this job on July 12, 2000, and is currently employed with them. He added that he usually works a forty hour week and occasionally works overtime. Claimant stated that he had to take the position, because he has bills to pay and a family to support. He added that he is still seeking employment for higher wages. TR. 63-64, 105.

Claimant stated that he met with Carla Seyler once in October, 1999, and his impression was that she was not trying to help him find a job. He stated that she suggested mechanic jobs, despite the fact that he had been told by Dr. Bailey that he could never return to mechanic work. However, he conceded that Ms. Seyler did not given him any mechanic positions in her assessment. Claimant stated that Ms. Seyler sent him a letter on December 1, 1999 listing four job descriptions. He stated that he had previously applied with two of the employers, but re-sent his applications. Claimant added that he was told that there were no positions available with any of the companies. He added that she sent him additional positions, and that he was also told those positions were unavailable. Claimant stated that he maintained a positive approach and checked back with some of the employers to see if new positions had opened. He stated that it was his understanding, from Ms. Seyler's letter, that the listed employers had positions that were available. Claimant testified that he did not remember ever telling any of the potential employers that his attorney sent him to them. He did admit to requesting a written letter, stating no positions were available, from M & L Industries. Claimant stated that when he visited some of these employers, he was told that there was no need to fill out an application if there were not any positions available. He noted, in particular, that the hiring individual at Team Honda refused to speak with him about any available positions. Claimant testified that he was told by every employer on Ms. Seyler's list that there were no positions available. He added that he could no longer perform the duties of a service advisor, one of the positions given to him by Ms. Seyler. Claimant testified that he did not apply to every employer in person, but did call and verify that

there were no positions available. TR. 65-83, 85, 116-119.

Claimant stated that since his initial surgery, he has suffered both back and leg pain. He stated that it varies in severity depending on the day. He stated that he has problems with prolonged standing and sitting in excess of thirty minutes. Claimant testified that his physical therapist was helping him work on his ability to sit and stand for thirty minutes. This was done in January, 2000 prior to Carrier cancelling his physical therapy. He stated that Claimant conceded that he has gone on one or two fishing trips in the past six months. He stated that he does yard work on a weekly basis and occasionally plays golf. He testified that he did painting around the house and in his workshop as well as climb a ladder during construction of his workshop. Claimant added that after some of the more strenuous activities, he has to stay in bed because of pain. He stated that the only pain medication he currently takes is Advil, which he takes two or three times a day. He stated that he cannot take his prescribed medication too often, because it upsets his stomach. TR. 98-104, 128, 130.

Emma Lee LeFebvre

Emma LeFebvre testified that Claimant is her son-in-law. She stated that she worked for Respondent for twenty-five years, with her last position being the administrative assistant to the president. She stated that she retired in December, 1995, but still has an on-going association with Respondent involving asbestosis claims. Ms. LeFebvre stated that she is currently being paid by the Baton Rouge Steamship Association for handling these claims. TR. 24-27.

Ms. LeFebvre testified that when she began working for Respondent in 1972, she began handling all of the workers' compensation cases and continued to do so until her retirement in 1995. She stated that she did not aid Claimant in getting his job with Respondent and did not even know that he had initially applied for the job. TR. 27.

She stated that she was involved in handling Claimant's longshore claim. Ms. LeFebvre stated that Claimant reported he was hurt in March, 1995 and that he had informed the wharf superintendent of his injury. She added that he continued to work until May, 1995. At that time he was working on a ship and re-injured himself. Ms. LeFebvre stated that she, on behalf of Respondent, sent him to the doctor and wrote an accident report. She testified that she was the one who dealt with both Claimant and Carrier in trying to arrange for Claimant's surgery. She stated that both she and her husband personally took Claimant to New Orleans to see Dr. Applebaum, because he could not sit due to his pain. TR. 28-29.

Ms. LeFebvre testified that there should have been more time, approximately two weeks, between the date that he quit work and the date that he underwent surgery, June 14, 1995. She stated during that period of time, Claimant appeared to be in a lot of pain. She testified that after the surgery, Dr. Bailey released Claimant to work under many restrictions. She stated that Respondent's president and the wharf superintendent created a position as maintenance supervisor for Claimant that would meet these restrictions. She stated that this was a position where Claimant would not have to do any kind of mechanic work. She

added that a new office was built for Claimant with air-conditioning, and his supervisor told him that he could go home when his pain increased. Ms. LeFebvre testified that he continued in the position until his discharge on September 30, 1999. TR. 29.

She testified that the most similar position to maintenance supervisor was shop foreman. Ms. LeFebvre stated that the shop foreman position was different only in that the position required mechanic work and moving equipment. She testified that the individual employed as shop foreman was returned to the mechanic force when Claimant was appointed maintenance supervisor. She stated that Claimant could not do the mechanic work, so the actual mechanic was required to do whatever mechanical and heavy lifting work was needed. Ms. LeFebvre stated that Respondent was pleased with his performance as maintenance supervisor, because he was good at operating the computer. She added that after Claimant returned to work with Respondent as a maintenance supervisor, he did not return to a mechanic position. TR. 29-31.

Ms. LeFebvre testified that Claimant was the only individual terminated on September 30, 1999. She stated that Respondent had lost a big account, so business was slow. She stated that on May 25, 2000, Respondent terminated approximately ten employees. Ms. LeFebvre testified that it was her understanding that Claimant would be placed on full compensation. TR. 31-34.

Carla Seyler³

Carla Seyler testified as an expert in the field of vocational rehabilitation. She stated that she met with Claimant and prepared a report, dated October 28, 1999, using his background information, educational information, medical records, work history, and vocational testing results. *See* RX-16, p. 49-53. She stated that she sent a letter to Dr. Bailey, dated March 28, 2000, outlining various job descriptions for him to review, and that he approved of all of the jobs presented to him. She stated that these descriptions were jobs that she actually located. She testified that Dr. Bailey did not indicate any specific restriction on the number of minutes Claimant could stand. Ms. Seyler also stated that when her office contacted the employers, there were no specific time periods given for sitting and standing. The positions that she located were service manager, shop foreman, assistant vehicle and equipment maintenance manager, vehicle and equipment maintenance manager, and service advisor. She stated that at those positions, employees are given chairs and desks and are required to do minimal walking. Ms. Seyler testified that her caseworker observed all of the service managers and advisors sitting when he visited the employers' facilities. She stated that it was her opinion that the service advisors had more control over their sitting and standing than was earlier testified to. Ms. Seyler stated that she was aware that the classification

³The vocational rehabilitation reports and correspondence from Carla Seyler are reproduced as RX-16, pp. 1-177. This exhibit includes all of the evidence that Ms. Seyler used in evaluating alternative employment for Claimant. These records have been considered by the Court, along with Ms. Seyler's testimony, and will be specifically referred to in the body of the opinion where relevant.

for service advisor was light and service manager as sedentary. TR. 217-224, 263-270.

Ms. Seyler outlined specific dealerships that had available service advisor positions where the employee could sit or stand at his option. She also stated that the majority of these dealerships operate on a computer network, which Claimant would be familiar with. She listed these dealerships as Hollingsworth Mazda, Team Honda, Audubon Ford, Diamond Ford, Price LeBlanc Toyota, All-Star Ford Lincoln Mercury, and Saturn of Baton Rouge. The Saturn dealership required more standing than the others. Ms. Seyler gave the salary ranges from \$2,000 to \$5,000 per month. Ms. Seyler stated that these service manager/advisor position are commission-based, and the range given is based on what is reasonable to expect in that line of work. She stated that her own personal experience is that the service manager rarely has to actually walk outside to look at the car. Ms. Seyler noted that Claimant has performed this type of job before and would be familiar with the work requirements. She admitted that Claimant had informed her that he did not think he could do this type of job. She added that she listed these positions as potential available jobs without knowing Dr. Bailey's work restrictions for Claimant. She opined that she believed Claimant could do bench mechanic work but not the type of mechanic work that he was doing originally. TR. 225-233, 253-256, 257-259.

Ms. Seyler testified that she also notified Claimant of two other positions as a service manager at Emory Equipment and M&L Industries. She stated that she would not recommend the Community Coffee urn technician position to Claimant. Ms. Seyler added that Headon Inquest service manager position would not require diesel mechanical experience. She stated that employees in these types of positions get a lunch break from thirty to forty-five minutes. They are given an additional break of fifteen minutes in the morning and in the afternoon. Ms. Seyler conceded, however, that when she sent Claimant these job listings, she was assuming that there would be a turnover, and more positions would be open. TR. 234-239, 252.

Ms. Seyler testified that one of her tasks was to determine if Claimant's position at Respondent's facility after his surgery was sheltered employment. She stated that she contacted several businesses and determined that the job position Claimant occupied, where he would not actually have to perform the hands on mechanical work, existed in approximately 40% of the companies. She described Claimant's attitude as to vocational alternatives as negative. She admitted, however, that she could not dispute Claimant's assertion that he applied for some of the listed jobs before they were even given to him. Ms. Seyler stated that, as an example, when Claimant applied to M & L Industries, he stated that his attorney sent him and requested a paper stating no jobs were available. She stated that her office had notified the employer that Claimant might be applying for the open position. Ms. Seyler conceded, however, that she had no evidence to contradict Claimant's assertion that he tried to obtain a job, but no one would return his calls. Ms. Seyler stated that it was not advisable to wait for over a month before submitting an employment application. Given Claimant's performance while at Scott Equipment, she opined that Claimant would be capable of performing a shop foreman position at a similar rate of pay. TR. 240-244, 256, 272.

Ms. Seyler opined that Claimant could have obtained any of the listed positions if he would have diligently tried and maintained a positive approach. She stated that there is a large demand for service

advisors, and that it would probably be one of the easiest jobs to obtain. As to Claimant's assertion that he submitted applications to these employers, she noted that Team Honda had not received an application from him as of January, 2000. She stated that during her hour and a half interview with Claimant, that he either stood or leaned on an object most of the time. TR. 245-250.

She stated that even when companies do not have openings, it is very important for prospective employees to fill out an application instead of just calling the employer's facility. She opined that Claimant applied for various jobs, some of which she would not recommend for him, due to his physical limitations. TR. 255-269.

Thomas Meunier⁴

Thomas Meunier testified that he has been a licensed vocational rehabilitation counselor for more than twenty years. He stated that he has testified as an expert in vocational rehabilitation in both federal and state court, and has been appointed as an independent expert in this field. Mr. Meunier testified that he was asked to check on the appropriateness and make recommendations as to Ms. Seyler's assessment of Claimant's employment prospects. Mr. Meunier testified that he was not retained to actually find a job for Claimant. He stated that he reviewed Claimant's medical reports, Claimant's file from Seyler-Favaloro, and the letters sent to Claimant. He also met with Claimant two times and communicated several times by phone. TR. 130-135, 157-158.

Mr. Meunier testified that he learned Claimant had numerous work restrictions including a limit of lifting fifteen to twenty pounds occasionally. He stated that Claimant was restricted from engaging in most light exertion work, because his repetitive lifting is limited to zero. His sitting and standing restrictions were limited to not more than thirty minutes at a time. He added that the restrictions given, both exertionally and non-exertionally, were more akin to sedentary work than light exertion work. He agreed with Dr. Bailey's conclusion that Claimant should not longer engage in mechanic work, which Mr. Meunier classified as medium exertion work. Mr. Meunier conceded that in his deposition, Dr. Bailey did not specifically restrict Claimant from prolonged standing, only suggested that he change positions every thirty minutes. He also stated that Claimant never underwent a functional capacity evaluation, only physical therapy. Mr. Meunier stated that Claimant occasionally sits for more than an hour at his current job. TR. 135-138, 160-162.

He testified that from July 20, 2000 to August 1, 2000, he had his job developer research and contact each one of the employers given by Carla Seyler as a suitable alternative employer with available positions. Mr. Meunier stated that these jobs were set forth in her letter, dated July 28, 2000. The job developer was told by Mr. Meunier to contact the employer and advise them of Claimant's age, work experience, education, and work restrictions. Mr. Meunier testified that only one of the employers had

⁴At certain points in his testimony, Thomas Meunier testified from his file review notes. These notes were submitted and entered into evidence as RX-22.

openings. That employer, Community Coffee, had an opening for an urn technician, a position that Mr. Meunier determined exceeded Claimant's work restrictions. Mr. Meunier stated that the job required some heavy lifting and prolonged standing. He stated that many of the employers his representative contacted informed his office that they had not had any openings for years. Mr. Meunier did state that in some cases it was difficult to discern the last date the employer had an opening. He conceded that the employers were accepting applications, but stated that it was standard procedure for employers who have no current positions available. He added that he only knew the availability status of the jobs at the time his office contacted them. Mr. Meunier stated that Headon Inquest, an employer that Carla Seyler had contacted, advertised for a service manager. He stated that when Claimant went to see him, he was told that there were no current openings. Mr. Meunier stated that he never personally attended these interviews, but he spoke with the employers. He added that no employer ever reported that Claimant presented himself negatively. He stated that if a Claimant volunteers that he is involved in litigation for a back injury, that could have an impact whether the employer is interested in him. TR. 139-147, 172-173, 196.

Mr. Meunier stated that the most inappropriate job suggested by Ms. Seyler was the service manager position. He stated that the prolonged standing and general nature of the job would be unsuitable for someone in Claimant's position. Mr. Meunier testified that the mere fact that employer provides an employee with a desk and chair does not mean that it is a sedentary job. He stated that he instructed his job developer to specifically ask if a thirty-minute sit/stand alternate restrictions could be accommodated. He stated that the service writer positions would not be appropriate due to the prolonged standing, even if a desk and chair was provided. He added that in one of the jobs where Claimant's restrictions could be accommodated, he was unqualified, because he had reported no diesel mechanical experience. Mr. Meunier stated that most of the jobs listed by Carla Seyler were inappropriate because they involved standing for more than thirty minutes. Additionally, the issue he was most concerned about was that Claimant be able to alternate sitting and standing throughout the day as needed. Mr. Meunier identified a modified shop foreman position with M & L Industries as the most appropriate for Claimant. However, he cautioned that the shop foreman he spoke to did state that although he was not supposed to do mechanic work, he did do it when the shop was busy. Mr. Meunier stated that the wages for that position were \$12.50 per hour to \$15.50 per hour. He stated that the Team Toyota position, although it was described as suitable, was inappropriate, because it violated Claimant's work restrictions. He stated that it is his personal experience from visiting dealerships that the service advisors have a very active role and are required to be on their feet most of the day when the facility gets busy. He also stated that he did not classify this type of job as one with a high turnover. TR. 147-148, 182-188, 210-212, 279-285.

Mr. Meunier did state that his office found jobs for Claimant more sedentary than light in nature. This included dispatching, inside sales work with a lumber company, customer service representative, order clerk, and gate guard. He gave the salary ranges for these positions as above minimum wage in the \$7.00 to \$10.00 range, but stated that the wages for a sales representative were difficult to establish, because these position are paid by commission. Mr. Meunier stated that the most ideal job for Claimant would be dispatching, because the job entailed people skills, scheduling the work of others, and inventory control.

Mr. Meunier classified Claimant's modified job, post-surgery, at Respondent's facility as "odd lot employment," which would not exist in the competitive labor market. He opined that the nature of the position and Claimant's unrestricted ability to leave placed it as either sheltered employment or odd lot employment. TR. 148-154, 158.

Mr. Meunier ultimately concluded that other than the position at M & L Industries, none of the jobs that Carla Seyler identified for Claimant were either suitable for him or available. He stated that Claimant could probably earn from \$7.00 to \$10.00 an hour in the types of jobs that would be appropriate for him. He conceded that Dr. Bailey had approved some of Carla Seyler's light duty positions and had not rescinded his approval. Mr. Meunier testified that Claimant applied for some jobs that were not listed in any of Carla Seyler's reports. He stated that although Claimant was applying for other, lesser paying he chose to work for Scott Companies, a job he found on his own, that paid \$15.00 per hour. He concluded that Claimant was motivated and really wants to work at a job that pays more than minimum wage. TR. 155-156, 170, 206-210.

Gregory Johnson

Gregory Johnson testified that he was Respondent's employee from September, 1978 to May, 2000. He stated that he held several positions there throughout his employment, including Courier, Agent, Assistant Superintendent, Wharf Superintendent, General Superintendent, Stevedore Manager, General Manager, and President. He stated that he knew Claimant, and that Claimant worked for him as a forklift mechanic the entire time that he was employed by Respondent. Mr. Johnson stated that he prepared the accident report, dated June 5, 1995, involving Claimant. He added that he was notified after the accident with the forklift carriage, and that Claimant continued to work. He testified that it was common for employees in that type of work to "pull" their back and try to work it out, as well as inform the supervisor about the injury. Mr. Johnson stated that Claimant did not ask to see a physician at that time. Mr. Johnson stated that Claimant reported his back worsening while loading a gearbulk vessel. He testified that he did not know the date that Claimant's back worsened, but stated he told Claimant he was off work until he saw a doctor. He added that he could see a change in Claimant's condition between the forklift carriage incident and loading the gearbulk vessel. He stated that Claimant stopped working on that day and saw a physician shortly thereafter. CX-2, pp. 1-10, 19-20.

Mr. Johnson testified that Claimant returned to work at Respondent's facility after his surgery. He stated that Claimant returned to work in a supervisory position, not as a forklift mechanic. He stated that there was a shop foreman already in place when Claimant returned to work, and that the shop foreman was demoted so that Claimant could assume the position. He stated that the former shop foreman was required to do mechanic work on occasion, but Claimant was not required to do those tasks. Mr. Johnson added that the job was tailored to fit Claimant's limitations, which included computerizing the inventory and reorganizing the maintenance system. He testified that the former shop foreman had no experience with the computer or inventory, and Claimant did have such experience. He also indicated that he was not happy with the former shop foreman's performance. Mr. Johnson admitted that the supervisory job was

essentially created for Claimant during the reorganization of the shop. Mr. Johnson stated that Claimant had many skills, including limited computer skills, that made him suitable for the position. He stated that Claimant was allowed to sit and stand at will and to go home if he was in pain. CX-2, pp. 11-15, 25-27.

Mr. Johnson testified that Claimant's duties consisted of supervising the mechanics and coordinating their schedules. Additionally he met with vendors and did the purchasing for the shop. Mr. Johnson stated that Claimant would occasionally drive an eighteen-wheeler on the dock, which required him to climb into the cab of the truck. He observed that driving the truck seemed to have an impact on Claimant's back, and that usually he would take the day off work the next day. Mr. Johnson stated that he had no doubt that Claimant was in pain when he said that he was. He stated that Claimant did essentially the same thing as the former shop foreman except that Claimant was in charge of the inventory. Mr. Johnson testified that Claimant worked eight hours a day, five days a week. He added that Claimant worked in this capacity for four years, until his termination. Mr. Johnson stated that Claimant did not miss an excessive amount of work, nor did he ever complain that he could not perform the duties. He noted that it was obvious Claimant was in pain. CX-2, pp. 27-30.

Mr. Johnson stated that he terminated Claimant on September 30, 1999, because business had been steadily declining. He testified that Ralph Hill, president of Gulf Services, was involved in the decision to terminate Claimant's employment. He added that the terminations occurred both because the company lost a contract with paper and was subsequently sold. He opined that the decreased in business began in 1998 and continued until the company was sold in March, 2000. He stated that no one else was terminated at that time, but that the position itself was terminated. Mr. Johnson stated that the shop foreman's duties were transferred to the General Superintendent. He testified that he was the next termination at Respondent's facility on May 25, 2000 due to downsizing. He stated that about ten other people were additionally laid off that same day. He added that it was his understanding that Claimant was going to be placed on full compensation subsequent to his termination. CX-2, pp. 15-17, 20-22, 31-32.

Ralph Hill

Ralph Hill testified that he was formerly employed by Respondent and Gulf Services, its parent company. He stated that he began working for Respondent in 1956, and was promoted from assistant manager, to manager, and eventually to president. He stated that he transferred to Gulf Services as president around 1988. He stated that he could not recall which company he was working for when Claimant was employed by Respondent. Mr. Hill added that Claimant's mother-in-law was his secretary. He stated that he was aware that Claimant had an injury in the scope of his employment, but could not recall either the details of the accident or that exact date. Mr. Hill added that he was not involved in preparing the accident report involving Claimant. He stated that he was aware that Claimant underwent back surgery, because Claimant's mother-in-law told him. CX-7, pp. 1-8.

Mr. Hill stated that Claimant was made shop foreman, or maintenance supervisor, after his surgery because he possessed skills that the former shop foreman did not. He stated that he could not recall

Claimant not being required to do mechanic work, but stated that he did see Claimant doing physical mechanic work. He stated that Claimant's supervisor was Greg Johnson. Mr. Hill denied that Claimant's position was created for him, but did state that the former shop foreman was demoted to mechanic because of Claimant's inability to do any heavy lifting. He stated that he was not involved in Respondent's daily operations, and that Greg Johnson would be the appropriate one to talk about Claimant's job requirements. Mr. Hill added that he was not involved in the decision to place Claimant in the shop foreman position after his surgery. CX-7, pp. 9-12.

Mr. Hill testified that he was aware that Claimant was terminated on September 30, 1999. He stated that business had declined, and Greg Johnson was under pressure to find ways to save money. He added that several other people had quit and their positions had not been filled because of the decline in business. Mr. Hill stated that cutting costs at the shop was possible because the company could subcontract for that type of work. He added that Respondent did change compensation carrier companies in 1998, but could not recall the exact date. Mr. Hill testified that there was someone in the shop after Claimant's termination doing the ordering and inventory, but it was a full-time mechanic. He stated that it was his understanding that the actual position was eliminated. Mr. Hill testified that Respondent used to employ around twenty-five people, but currently only employs seven or eight. CX-7, pp. 13-18.

II. MEDICAL DEPOSITIONS AND RECORDS

1. DEPOSITIONS

Robert L. Applebaum, M.D.⁵

Dr. Robert L. Applebaum, M.D., board certified neurosurgeon, testified by deposition that he saw and treated Claimant on two occasions. He stated that he was not Claimant's treating physician. He testified that he initially examined Claimant on June 14, 1995 and again on July 18, 2000. Dr. Applebaum stated that in his July 18, 2000 report, he indicated that Claimant self-reported an injury to his back and legs, dating back to March, 1994. He testified that on that date, Claimant was complaining of pain in his low back and pain in his legs. Claimant reported that the pain in his back was aching, which became more intense with activity and improved with sitting. Claimant reported the leg pain was worse in his left leg. He also self-reported constant numbness in his right leg. Dr. Applebaum noted positive findings in the straight leg raising test, bowstring sign, and sensory examination. He confirmed that these positive findings were

⁵The medical records and reports from Dr. Applebaum are reproduced as RX-4. These records have been considered by the Court in conjunction with Dr. Applebaum's deposition testimony and will be referred to in the body of the opinion to the extent they add to his testimony.

residual from his previous injury and surgery. RX-19, pp. 1-5, 13-17.

A physical examination revealed moderate mechanical and minimal neurological findings, which he attributed to the previous injury. He noted that an MRI of the lumbar spine revealed some sclerosis or thickening of the bone at the L4-5 disc space, as well as narrowing and collapse of the space. Dr. Applebaum stated that it was not unusual for disc space to collapse after surgery, although it is not an optimal occurrence. He stated that it would not self-repair and that it would eventually fuse. He stated that the only time he would recommend surgery would be when there was some compression of the nerve root as a result of the collapse. He testified that he saw no evidence of a recurrent ruptured disc. Dr. Applebaum stated that he disagreed with Dr. Bailey's diagnosis of a recurrent disc. Dr. Applebaum stated that he also reviewed some of Dr. Bailey's medical records regarding Claimant. Dr. Applebaum testified that his impression was that Claimant might have mild lumbar stenosis, but that he had reached maximum medical improvement. He added that Claimant could continue in his current occupation as a driver for an auto auction. Dr. Applebaum admitted that it was the only job that he reviewed for Claimant. Dr. Applebaum stated that he did not order a functional capacity test and admitted that such a test would verify his clinical impression. He stated that he was not asked to check other jobs to see whether or not they would fit within Claimant's limitations. Dr. Applebaum opined that if a patient exhibited symptomology along with a collapsed disc and recurrent disc, he would potentially consider surgery. RX-19, pp. 1-8, 12-19.

Dr. Applebaum listed Claimant's work restrictions of July 18, 2000 as moderate lifting of less than forty pounds and no prolonged bending or stooping. He stated that he would not place any restrictions on his ability to stand or walk. Dr. Applebaum qualified this statement by adding that it would be beneficial, not necessary, for him to be in a job where he could alternately sit and stand every half hour. He testified that he would not place any outside limits on the amount that Claimant could stand and walk, just that Claimant be able to sit down for ten to fifteen minutes when necessary. Dr. Applebaum stated that standing on hard surfaces for long periods of time would not be beneficial to a back surgery patient. He opined that Claimant should be able to do a job where he stood and walked for an hour but could sit. After examining Claimant's physical therapy reports, Dr. Applebaum testified that, based solely on those reports, Claimant could have problems standing or sitting for more than thirty minutes. He did add, however, that he would never base his assessment on just the physical therapy reports. Dr. Applebaum testified that Claimant never informed him that he could only sit for ten minutes and, in fact, stated that sitting helped him. RX-19, pp. 9-11, 24-25.

Steven M. Bailey, M.D.⁶

⁶The medical records and reports from Dr. Bailey and The Neuromedical Center are reproduced as RX-2. These records have been considered by the Court in conjunction with Dr. Bailey's deposition testimony and will be referred to in the body of the opinion to the extent they add to Dr. Bailey's testimony.

Dr. Steven Bailey, board certified neurosurgeon, testified that he had been practicing for approximately eight years. He stated that 25-30% of his patients are involved in litigation, but most of them are referred to him by friends or family as opposed to an attorney. He testified that Claimant was referred to him by Claimant's sister-in-law, who worked for him. Dr. Bailey first saw Claimant on June 1, 1995. Claimant self-reported a three week history of right leg pain, but did not specifically describe the circumstances of the accident. Dr. Bailey noted that Claimant had a history of having done a significant amount of lifting in his job. He noted that Claimant had seen Dr. Wilson more than a week prior to his initial evaluation, and Dr. Wilson had given him a Cortisone shot and placed him in a lumbar brace. He testified that Claimant was complaining predominantly of lower back pain and radiating right leg and calf pain. Dr. Bailey stated that the MRI taken revealed central and right-sided disc herniation, consistent with right-sided symptoms. He did not note any left-sided symptoms. RX-9, pp. 2-10.

Dr. Bailey stated that on June 15, 1995, he performed a partial hemilaminectomy and discectomy on Claimant. He testified that this procedure involved essentially removing a piece of the herniated disc, which, in Claimant's case, was at the L4/5 disc. He stated that he saw Claimant in follow up on July 6 and August 4, 1995. He stated that he released Claimant to work on October 20, 1995 with light duty restrictions. Particularly, he restricted Claimant from lifting over 20 pounds, no repetitive lifting, and no stooping, crawling, or climbing. He added that Claimant should not work at unprotected heights, which he gave as 10 feet or above. Dr. Bailey gave his conception of repetitive lifting as lifting that is required 34 to 66% of the time. He placed the same restrictions on pushing and pulling. Dr. Bailey stated that he needed to change positions frequently. He stated that he saw Claimant on April 22, 1996, and opined that Claimant had significantly improved. Dr. Bailey noted that Claimant was limited in his activities, but his pain was at a tolerable level. Dr. Bailey testified that he told Claimant to stay as active as possible. At that time, Claimant self-reported that he was working eighty to ninety hours per week. RX-9, pp. 11-15, 48-52.

Dr. Bailey stated that he next saw Claimant on July 30, 1996, and Claimant reported a significant amount of lower back pain. He stated that Claimant reported diminished leg pain. Dr. Bailey opined that Claimant had reached MMI on that date and assigned him a permanent partial disability rating of 15%. He stated that Claimant could not return to his old job, as a mechanic, because he was required to do a lot of heavy lifting in that position. His understanding was that Claimant returned to work for Respondent in a supervisory position. Dr. Bailey stated Claimant complained of pain in his left side during his next visit on October 1, 1998. Claimant self-reported that he previously had both an orthoscopy and a partial minisectomy of the left knee, performed by Dr. Winder. Dr. Bailey opined that Claimant could have developed an antalgic gait, causing his problems on the left side. Dr. Bailey noted that Claimant was 85% improved from pre-surgery regarding his right leg pain. He added that Claimant's straight leg raising and Patrick's test were normal at that time. RX-9, pp. 11-17.

Dr. Bailey testified that the next time he saw Claimant was on October 15, 1998. He noted that the most recent MRI indicated post-surgical changes, including scarring, at the L4/5 level. Dr. Bailey testified that he saw no evidence of a recurrent disc. He noted an increased bulging at the level above

where Claimant had the disc surgery. Dr. Bailey opined that, at the time it did not appear to be clinically significant, but he could not definitively opine on the issue. He stated that the next time he saw Claimant was January 28, 1999. Dr. Bailey noted that Claimant had been involved in some physical therapy. He stated, however, that Claimant reported an exacerbation of the back and left leg pain. This pain continued throughout Claimant's next visit on April 16, 1999. Dr. Bailey noted that the pain was concentrated in Claimant's left leg, and that a knee brace seemed to be helping him. Dr. Bailey next saw Claimant on December 13, 1999. Claimant self-reported a significant flare up of back pains and left-sided upper buttock pain. Dr. Bailey advised another follow up MRI scan and cautioned Claimant to be careful with climbing and lifting. He noted that the scan revealed some recurrent disc material, along with scar tissue. Dr. Bailey also noted an associated disc collapse. He stated that this collapse would cause Claimant to suffer mechanical back pain and potentially lead to problems with nerve roots. He opined that Claimant's disc collapse was the cause of his left-sided pain. He also stated that as of January 14, 2000, there was evidence of some right-sided nerve root compression. Dr. Bailey opined that the MRI scan, recurrent disc material, and collapse could explain Claimant's symptoms of pain. Dr. Bailey stated that before he would recommend surgery for Claimant, he would want to administer a weight bearing test in order to see any further changes in Claimant's spine. RX-9, pp. 17-29, 42.

Dr. Bailey testified that Claimant's complaints of mechanical back have been consistent and seem to be escalating to some degree. He stated that Claimant's follow-up scan of his back shows more recurrent disc material than was previously evident. Dr. Bailey opined that Claimant's condition was evolving, which would explain the change of his symptoms. He added that it was his opinion that Claimant would need further surgery in the future. He stated that as of May, 2000, his restrictions on Claimant's ability to work would be occasional sedentary to light level lifting. Dr. Bailey added that repetitive lifting should be kept to a minimum. He stated that driving heavy equipment or driving long distances would not be appropriate, because both activities involved repetitive movements of the legs. Dr. Bailey added that prolonged sitting would probably be inappropriate. Dr. Bailey stated that he approved a list of appropriate jobs for Claimant on March 28, 2000. He stated that those jobs fit within his conception of "light duty" positions. Dr. Bailey added that he based his approval on the job description as given to him. He stated that Claimant was willing to work in his opinion, and at some points, wanted to work too much. RX-9, pp. 29-36, 47.

2. REPORTS & RECORDS

The Orthopedic Clinic/Carey E. Winder, M.D.

The first records from the clinic indicate that Claimant was seen on December 11, 1997 and reported bilateral wrist pain, left knee pain, and right thumb pain. Claimant reported the hand pain as occurring for several years. The reports indicate that Claimant has, in the past, used carpal tunnel splints but received no formal treatment for his hands. Knee pain was reported in the posterior area, both posteromedially and posterolaterally. A physical examination revealed that Claimant ambulated with a normal gait pattern. After administering a battery of motion and flexion tests, Dr. Winder's impression was

that Claimant had bilateral carpal tunnel syndrome, with his left side more symptomatic than the right. He had trigger thumb on the right side and a probable meniscal tear in the left knee with mild osteoarthritis. Dr. Winder administered an injection of Lidocaine, Marcaine, and Celestone for Claimant's knee. RX-3, pp. 14-15.

The records show that Claimant was next seen on January 13, 1998 complaining of pain in his knee with mild swelling. Dr. Winder noted that a verbal report from the nerve condition studies confirmed that Claimant had substantial carpal tunnel syndrome. A physical examination of the left knee revealed some crepitus and pain at the posteromedial joint line. Claimant had a positive Spring's test and some pain with the McMurray testing. Dr. Winder noted that it was appropriate for Claimant to proceed with surgery on his left knee and right hand. The records note that Claimant underwent a left knee arthroscopy, right carpal tunnel release, and right trigger thumb release on January 20, 1998. In his post operation visit, progress notes indicate that he has recuperated fairly well, noting

only knee pain. These notes also indicate that Claimant underwent physical therapy and exhibited an antalgic gait with a decreased stance on the left knee. RX-3, pp. 12-13, 25, 28.

Clinic records, dated March 12, 1998 indicate that Claimant still complains of knee soreness, however his overall functional status has improved. Dr. Winder noted trace effusion in his knee along with mild tenderness at the medial joint line. He also opined that Claimant could progressively increase his activities and continue working on a home exercise program. RX-3, pp. 8-12.

Dr. Winder next saw Claimant in a preoperative visit on March 20, 2000. His impression was that Claimant suffered from carpal tunnel syndrome in his left wrist, a ganglion cyst in the left wrist, and a ganglion cyst tendon sheath in his left thumb. He underwent this surgery on the same week as the preoperative visit. The last available records indicate that he was seen for a postoperative visit on April 10, 2000. RX-3, pp. 6-7.

HealthSouth Diagnostic Center of Baton Rouge

The MRI taken on October 8, 1998, indicates an increasing circumferential disc bulge, causing a flattening of the thecal sac. This was compared to the MRI taken May 31, 1995. The radiologist noted a prominent bilateral facet joint arthropathy causing dorsal lateral flattening of the thecal sac. This causes mild central spinal canal and lateral recess stenosis. The report notes a small, recurrent annular disc bulge to the right of the L4-5 with facet joint arthropathy. RX-5, pp. 3-6.

Surgi-Center of Baton Rouge/Mark Shoptaugh, M.D.

Claimant was referred to Surgi-Center by Dr. Steven Bailey. Records indicate that he reported

low back pain radiating into his right hip and right leg. These records note that Claimant underwent an epidural steroid injection by Dr. Lee, which has only minimally benefitted him. Claimant underwent a repeat injection and was discharged in good condition. RX-6, pp. 1-2

Baton Rouge Family Medical Center

Medical records from this facility indicate that Claimant visited this clinic for routine physical examinations as well as unexpected illness. Records dated June 2, 1996 show a diagnosis of a herniated lumbar disc with radiation to the right leg, hypercholesterolemia, and hypertension. This diagnosis was given in a pre operation consultation. RX-7, p. 24.

Records dated November 11, 1997 show that Claimant was seen for pain in his left hand and left knee. The assessment was given as mild tendinitis in the left hand and mild joint pain to the left knee. RX-7, p. 15.

Baton Rouge Physical Therapy Occupational Performance Center

Claimant was referred to the center for physical therapy stemming from his back injury in 1998, 1999, and 2000. He was seen six times in 1998. Records dated November 20, 1998 note that Claimant was seen for evaluation and treatment of lumbar pain and left lower extremity pain and/or paresthesia to the knee. The therapist assessed Claimant's disability as loss of an active range of motion, lack of independence with a home exercise program, sitting and standing for prolonged periods of time, and walking for prolonged periods of time. The report indicates that Claimant's initial goals include increasing his active range of motion and restoring the ability to sit, stand, and walk for prolonged periods of time. RX-8, pp. 35-55.

Records from the center note that Claimant was next seen on November 24, 25, and December 1 of 1998 and December 1, 1998. The assessment and initial goals remained the same, and the progress notes state that Claimant demonstrated improvement and decreased radicular pain. The therapist also noted that Claimant ambulated with an increased amount of antalgic gait with some increased in pain behavior. During the December appointment, Claimant reported increased pain behind the knee. RX-8, pp. 35-55.

Records from the facility indicate that Claimant did experience difficulty in scheduling his physical therapy appointments around October and November, 1998. On December 10, 1998 the therapist noted that Claimant had achieved his second goal, which was independence with a home exercise program. Claimant also reported an increased functional ability to play golf. On December 16, 1998, the therapist

noted that Claimant continued to experience continued right buttock discomfort, but met all of his initial goals outlined in the six previous visits. RX-8, pp. 35-55.

Claimant next reported for physical therapy on February, 12, 1999. The report noted that Claimant was receiving autotractive for decompression of the vertebral and neural structures in the lumbar spine. The therapist's assessment was that Claimant experienced problems with his lumbar range of motion, sitting and standing for prolonged periods of time, as well as the ability to perform work-related activities as self-reported by Claimant. These were given in the initial letter as the ability to sit at a desk, do computer/phone work, writing/paperwork, and standing/walking for prolonged periods of time. This therapy was scheduled to continue once a week for an eight-week period. At Claimant's last session on March 25, 1999, he reported that he could sit for thirty minutes and stand for twenty-five minutes. As to performance of his work-related activities, Claimant reported minimal discomfort when working. RX-8, pp. 25-35.

Center records show that Claimant was next seen in 2000 for evaluation and treatment of lumbar pain with left lower extremity pain and/or paresthesia. The initial report, dated January 31, 2000, notes that Claimant was employed as a foreman and reported difficulty in performing normal work activities such as prolonged sitting, standing, and walking. Claimant's limitations were assessed as sitting for more than ten minutes, squatting, ascending/descending stairs and standing for more than ten minutes. Claimant's work injury evaluation form on this date indicates that he sustained a lifting injury at work on March 13, 1995. It noted that Claimant was currently employed as a shop foreman by Scott Construction Equipment. The center records note that Claimant missed subsequent therapy appointments and reported that he could not reschedule due to work. RX-8, pp. 5-7, 18-24.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses who testified at the hearing and upon an analysis of the entire record, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applied the principle, enunciated in Director, OWCP v. Maher Terminals, Inc., 115 S. Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates section 556(d) of the Administrative Procedures Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 221 (1994).

I. FACT OF INJURY AND CAUSATION

To establish a prima facie claim for compensation, a claimant does not need to affirmatively

establish a connection between the work and the harm. Section 20(a) of the Act, 33 U.S.C. §920(a), provides the claimant with a presumption that his injury was causally related to his employment if he establishes two things. First, the claimant must prove that he suffered a physical injury or harm. Second, he must show that working conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the injury. See Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989).

1. CLAIMANT'S SHOWING OF A HARM

In proceeding to the merits of Claimant's assertion of injury, the first prong of his prima facie case requires him to establish the existence of a physical harm or injury. The Act defines an injury as the following:

accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
33 U.S.C. § 902 (2).

An accidental injury occurs when something unexpectedly goes wrong within the human frame. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). Additionally, an injury need not involve an unusual strain or stress, and it makes no difference that the injury might have occurred wherever the employee might have been. See Wheatley; Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (5th Cir. 1954). The claimant's uncontradicted credible testimony may alone constitute sufficient proof of physical injury. See Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980).

As noted above, the administrative law judge has the discretion to determine a witness' credibility. Furthermore, the judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of Claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

In the present case, Claimant alleges that he sustained an injury to his back in March, 1995 while attempting to unload a fork lift carriage outside of Respondent's mechanic shop. He also testified that he continued to work, and re-injured his back in May, 1995 while loading a vessel. *See* TR. 38-41. This Court found Claimant's testimony regarding his injury generally straight-forward, unequivocal, and credible throughout the hearing. His testimony is corroborated by Greg Johnson, who noted that Claimant reported that he was hurt on the same day that it happened. *See* CX-2, pp. 1-10. Claimant's testimony regarding a back injury is bolstered by the medical evidence in the record, which indicates that soon after he reported

the accident, he had a partial hemilaminectomy and discectomy in order to alleviate central and right-sided disc herniation. *See* RX-9, pp. 11-15.

Therefore, the evidence of record establishes that Claimant sustained a back injury and continues to suffer pain stemming from that injury. Claimant's testimony regarding his injury is credible and sufficiently corroborated by the medical reports in evidence. This, in and of itself, is sufficient to meet the first prong of Claimant's prima facie case.

2. CLAIMANT'S SHOWING OF A WORK ACCIDENT

In order to invoke the section 20(a) presumption, Claimant must also show the occurrence of an accident or the existence of working conditions which could have caused the harm. The section 20(a) presumption does not assist Claimant in establishing the existence of a work-related accident. *See Mock v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 275 (1981). Therefore, Claimant has the burden of establishing the existence of such an accident by a preponderance of the evidence.

The Court must weigh all of the record evidence, including that supporting Claimant's testimony and that contradicting it, in order to determine whether Claimant has met his burden in establishing a work accident.

In the present case, there is no evidence to contradict Claimant's testimony concerning the accident. Additionally, Claimant consistently reported this version of events to his supervisor, Greg Johnson and at the hearing. Claimant alleges that he felt his back "pull" when he was unloading a forklift carriage from a truck. *See* TR. 38-41. He testified that he continued to work for more than a month, but re-injured his back while he was helping to load a gearbulk vessel. Greg Johnson also testified that Claimant was employed in a position where he would frequently engage in heavy lifting, and that it was common for employee's in Claimant's position to pull or strain their backs. CX-2, pp. 1-10.

In light of this evidence, the Court finds that Claimant has established the existence of conditions at Respondent's facility that could have caused or contributed to his condition. Therefore, Claimant is entitled to invoke the section 20 presumption.

3. REBUTTAL EVIDENCE

Once Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). The employer must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and the employment or working conditions. *Ranks v. Bath*

Iron Works Corp., 22 BRBS 301, 305 (1989); See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, it no longer controls, and the record as a whole must be evaluated to determine the issue of causation. See Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982); See Del Vecchio v. Bowers, 296 U.S. 280 (1935).

In this case, Respondent has not presented substantial countervailing evidence to sever a causal connection between Claimant's employment and his injury. Therefore, this Court finds that conditions existed at Respondent's facility that could have caused, contributed to, or accelerated Claimant's back injury.

II. NATURE/EXTENT OF DISABILITY AND MAXIMUM MEDICAL IMPROVEMENT

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. See Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, *supra*, at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, fn. 5, (1985); Trask v. Lockheed Shipbuilding Construction Co., *supra*; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. See Louisiana Insurance Guaranty Assoc. v. Abbott,

40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); See Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

A judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quinton Eng'rs, 14 BRBS 395, 401(1981). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15 (1988). The date of permanency may not be based on the mere speculation of a physician. Steig v. Lockheed Shipbuilding & Constr. Co., 3 BRBS 439, 441 (1976). In the absence of any other relevant evidence, the judge may use the date the claim was filed. Whyte v. General Dynamics Corp., 8 BRBS 706, 708 (1978).

If the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that maximum medical improvement has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245 (1986); See Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142 (1978), aff'd mem., 617 F.2d 292 (5th Cir. 1980).

In this case, both Drs. Applebaum and Bailey opined that Claimant's condition was permanent. Dr. Applebaum examined Claimant and determined that the maximum medical improvement date was July 18, 2000. *See* RX-4, p. 6. Claimant's treating physician, Dr. Bailey, opined that Claimant had reached maximum medical improvement on July 30, 1996. *See* RX-2, p. 13. This Court takes the treating physician's opinion as determinative and finds that Claimant reached maximum medical improvement on July 30, 1996. Therefore, from May 29, 1995 to July 29, 1996, Claimant's disability was temporary. From July 30, 1996 and continuing, his disability is permanent in nature.

The extent of disability can be either partial or total. Total disability is a complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work- related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work- related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

In the present case, Dr. Bailey did not release Claimant to work until October 29, 1995. *See* RX-9, pp. 11-15, 48-52. He also opined that Claimant could no longer work as a mechanic, his regular and usual employment. *See* RX-9, pp. 11-15. Therefore, this Court finds that from Claimant's last day of employment, May 29, 1995 to October 29, 1995, Claimant was totally disabled.

Total disability, and loss of wage earning capacity, becomes partial on the earliest date that the employer establishes suitable alternative employment. See Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, physical restrictions, and an opportunity that he could secure if he diligently tried. See New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); See McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). A showing that the Claimant has been employed in “sheltered employment” is insufficient to establish suitable alternative employment. See Harrod v. Newport News Shipbuilding & Drydock Co., 12 BRBS 10 (1980). Sheltered employment is a job for which an employee is paid even if he cannot do the work and which is unnecessary. See Id.

(1) October 30, 1995 to September 30, 1999

In this case, Claimant returned to work at Respondent’s facility on October 30, 1995 and worked until his termination on September 30, 1999. Both Claimant and Greg Johnson, his supervisor, testified that Claimant was employed as maintenance supervisor during that period of time. *See* TR. 47-53, 11-15. This Court finds that the evidence in this case shows that the position of maintenance supervisor constitutes “sheltered employment.” Although the similar position of shop foreman position did exist prior to Claimant’s injury, the job requirements significantly differed. *See* TR. 11-15. Unlike a traditional shop foreman, Claimant was not required to help with the mechanical duties in the shop. *See* TR. 11-15. Both Claimant and Greg Johnson testified that the former shop foreman, was required to do this. *See* TR. 47-53, 11-15. Additionally, Claimant was given his own office and allowed to sit, stand, and even leave work as needed. *See* TR. 27-30. Mr. Johnson testified that after driving an eighteen wheeler on a particularly busy day, Claimant would have to take days off for pain. *See* TR. 27-30. He was allowed to do this as needed.

Finally, the job position was not entirely necessary to Respondent’s operations. The duties of the position were merged with Mr. Johnson’s job duties, and the position itself was terminated when Claimant was laid off. *See* CX-7, pp. 13-18. In light of this evidence, this Court finds that the maintenance supervisor’s duties that Claimant was required to perform were vastly different from the former shop foreman’s duties. Additionally, it does not appear that the position of maintenance supervisor was necessary to Respondent’s daily operations. That, coupled with the allowances granted to Claimant in leaving work at his discretion indicates that this position was specifically tailored to accommodate Claimant and existed at the beneficence of Respondent. Therefore, the position of maintenance supervisor is sheltered employment and cannot constitute suitable alternative employment.

Claimant is not requesting total disability payments for this period of employment. Additionally, both parties stipulated that all compensation for Claimant's partial loss of wage earning capacity was paid through September 30, 1999. *See* CTX-1. Additionally, this past compensation was based on the correct average weekly wage, which this Court determines is \$1,245.00. Given these circumstances, and based on the parties' stipulations, this Court determines that Claimant is not entitled to any additional benefits for this period of time.

(2) October 1, 1999 through December, 6, 1999

Both Claimant and Respondent furnished vocational rehabilitation experts to testify as to Claimant's ability to engage in alternative employment after he was terminated from his position with Respondent. Both experts, Carla Seyler and Thomas Meunier, testified as well as submitted reports. After an examination of the evidence, this Court finds that Respondent was unable to provide sufficient evidence of suitable alternative employment for this period of time.

Respondent's vocational rehabilitation expert, Ms. Seyler, met with Claimant on October 25, 1999, soon after his termination from Respondent's facility. Ms. Seyler subsequently did provide Claimant with job listings in two letters dated December 1, 1999 and July 28, 2000. *See* RX-16. She opined that Claimant could earn anywhere from \$2,000 to \$5,000 per month in the listed positions. This Court notes, however, that most of these jobs were not suitable for Claimant, given his restrictions. Although Dr. Bailey did not expressly forbid Claimant from sitting or standing in excess of thirty minutes, it is apparent from Claimant's physical therapy reports that he was having trouble with prolonged standing and sitting. *See* RX-8, pp. 35-55. Additionally, Dr. Bailey did recommend that it would be beneficial for Claimant to be able to alternately stand and sit as needed. *See* RX-9, pp. 11-15, 48-52. Thomas Meunier testified that the service manager listing given by Ms. Seyler was inappropriate, mainly because it did require prolonged standing. *See* TR. 147-148.

This Court places determinative weight on Mr. Meunier's testimony that the majority of jobs Ms. Seyler suggested were inappropriate for Claimant. Mr. Meunier opined that the jobs were unsuitable, especially the service manager position, because Claimant exhibited problems with prolonged sitting and standing. Additionally, even the position most in tune with Claimant's abilities and experience was rendered unsuitable. Mr. Meunier opined that the modified shop foreman's position with M & L would be appropriate because it did not require mechanical work. *See* TR. 147-148, 182-188. However, after speaking with the shop foreman at the facility, Mr. Meunier discovered that the position would require Claimant to do mechanical work when the shop got busy. *See* TR. 147-148, 182-188. Therefore, he opined that the position was unsuitable for someone with Claimant's condition. TR. 147-148, 182-188.

This Court agrees with Mr. Meunier's conclusion that, other than the modified shop foreman position at M & L industries, the jobs identified by Ms. Seyler were either not suitable for someone with Claimant's disability or unavailable. Additionally, it is evident to this Court that Claimant diligently pursued the job listings given to him by Ms. Seyler, even if he did not submit an actual application to every single

job listing. The fact that he chose the available position at Scott Equipment rather than one of Ms. Seyler's "possible" positions does not diminish Claimant's diligence in searching for employment. Therefore, this Court finds that Respondent has not sufficiently established suitable alternative employment in the claimed amount of \$2,000 to \$5,000 per month, or \$875.00 per week. Instead, this Court finds that Claimant's earning capacity for an appropriate job would be in the \$7.00 to \$10.00 per hour range, as established by Thomas Meunier. For a forty-hour work week, those positions would yield \$340.00 per week. Therefore, Claimant is entitled to permanent partial disability for this period of time, reduced by suitable alternative employment wages of \$340.00 per week. This reflects his partial loss of wage earning capacity and should be used with the exception of the following periods of time.

A. December 7, 1999 through May 19, 2000

This Court notes that Claimant was employed by Scott Construction Equipment from December 7, 1999 through May 19, 2000. Wage records from Scott Construction Equipment indicate that he earned \$15.00 per hour. *See* RX-13, p. 4. Therefore, Claimant's compensation for permanent partial disability will be reduced by his actual wages earned during this period.

B. July 12, 2000 through August 19, 2000

This Court notes that Claimant was employed by Baton Rouge Auto Auction from July 12, 2000 through August 19, 2000. Wage records indicate that he earned minimum wage, or \$5.15 per hour. *See* CX-5. Therefore, Claimant's compensation for permanent partial disability will be reduced by his actual wages earned during this period.

C. August 20, 2000 and Continuing

Claimant submitted a Supplemental Note of Evidence indicating that on August 20, 2000, he secured employment with Lofton as a security guard. *See* CX-8. Wage records from Lofton indicate that his current wages are \$6.50 per hour. *See* CX-8. This Court finds that these wages yield a partial loss of wage earning capacity similar to that given by Mr. Meunier for suitable alternative employment wages. Therefore, Claimant is entitled to permanent partial disability for this period of time reduced by suitable alternative employment wages previously established at \$340.00 per week. This reflects a partial loss of wage earning capacity when compared to his \$1,245.05 pre-injury weekly wage.

III. AVERAGE WEEKLY WAGE

Section 10 of the LHWCA sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to section 10(d), to arrive at an average weekly wage. *See Johnson v. Newport News Shipbuilding and Dry Dock Co.*, 25 BRBS 340 (1992). The determination of an employee's annual earnings must be based on substantial evidence. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

In the present case, the parties have stipulated to Claimant's average weekly wage in the amount of \$1, 245.05, as determined by his annual earnings in the year preceding his injury. *See* CTX-1. This Court further finds that these earnings are based on substantial evidence in the record.

IV. REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

(a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *See Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *See Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *See Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), *aff'g* 12 BRBS 65 (1980).

The Court has found that Claimant established causation with respect to his back injury and chronic pain stemming from the injury. Both parties have stipulated that Claimant's past medical expenses have been paid pursuant to section 7 of the Act. *See* CTX-1. However, this Court finds that Claimant is entitled to any additional, unpaid benefits as well as reasonable and necessary future compensable medical treatment associated with this work-related injury.

V. SECTION 48(a)

Section 48(a) of the Act provides that:

It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. 33 U.S.C. §948(a).

In establishing a *prima facie* case under section 48(a), a claimant must prove both that the employer committed a discriminatory act, and that the discriminatory act was motivated by animus against claimant

because of the pursuit of his rights under the Act. See Geddes v. Benefits Review Board, 735 F.2d 1415 (D.C. Cir. 1984); Holliman v. Newport News Shipbuilding & Dry Dock, 852 F.2d 759, 761 (4th Cir. 1988).

In the present case, Claimant has presented no evidence to indicate that his termination was either a discriminatory act or that his termination was related to his longshore claim. Mr. Johnson testified that Claimant's position was eliminated in order to cut costs. *See* TR. 15-17, 20-22. He stated that the position of maintenance supervisor was completely eliminated, and the duties transferred to the supervisor. *See* TR. 20-22. In this case, that would have been Mr. Johnson. In light of the corroborating testimony by Mr. Hill, this Court finds that the fact that Claimant was the only one terminated in September, 1999 was due to business concerns. *See* CX-7, pp. 13-18. Therefore, there is no evidence that his termination was a discriminatory act.

Along these same lines, it is equally evident to this Court that Respondent did not act with any animus in terminating Claimant. Both of Respondent's witnesses testified credibly that Respondent was experiencing a severe decline in business that eventually led to its sale. *See* TR. 15-17, 20-22; CX-7, pp. 13-18. Therefore, it is more likely that Claimant's termination was due to a decline in business and a desire to eliminate extra supervisory positions. In a section 48(a) claim, the burden of proof is on the Claimant to set forth his prima facie case. The evidence in this case indicates, at best, that Claimant was the only individual terminated in September, 1999. Claimant has presented no evidence that this act was either discriminatory or in retaliation for pursuing his rights under the Act. Therefore, Claimant's section 48(a) claim is without merit and will be dismissed.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits from October 1, 1999 and continuing, based on an average weekly wage of \$1,245.05, minus Claimant's suitable alternative employment wages of \$340.00, with the exception of the following periods of time:

(A) From December 7, 1999 through May 19, 2000, Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits based on an average weekly wage of \$1,245.05, minus Claimant's actual wages earned at his \$15.00/per hour employment;

(B) From July 12, 2000 through August 19, 2000, Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits based on an average weekly wage of \$1,245.05, minus Claimant's actual wages earned at his \$5.15/per hour employment.

(2) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

(3) Employer/Carrier shall pay or reimburse Claimant for reasonable medical expenses, with interest in accordance with Section 1961, which resulted from See 33 U.S.C. §907.

(4) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

Entered this 20th day of April, 2001, at Metairie, Louisiana.

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JAMES W. KERR, JR.

Administrative Law Judge

JWK/sls